

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Restoring Internet Freedom

WC Docket No. 17-108

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The City and County of San Francisco (“San Francisco” or “City”) submits these comments in this proceeding in which the Federal Communications Commission (“Commission” or “FCC”) seeks to undo the regulation of the internet that the Commission instituted just two years ago when it found that internet service is a “telecommunications service” as that term is defined in the Communications Act.¹ The Commission relied on that determination to implement its “net neutrality” regulations that prohibit blocking, throttling, paid prioritization, and unreasonable interference with a user’s ability to select, access, and use the internet.² The Commission’s justification for reversing the present regulatory scheme is its assertion that investment in deployment of broadband networks has declined since 2015 and that this decline is attributable solely to the Commission’s attempt to regulate the internet as a telecommunications service.³

San Francisco continues to support the Commission’s 2015 net neutrality policy. As San Francisco will explain herein, that policy has been good for consumers and the industry. The Commission’s suggestion that this policy stymied investment and hindered innovation is incorrect. The evidence shows that the internet has continued to thrive since the Commission adopted its net neutrality regulations. For that reason, the Commission cannot meet the standard for reversing an existing agency policy. Finally, San Francisco explains that, absent a finding that internet service is a telecommunications service, internet service providers (“ISPs”) cannot seek to preempt state and local regulations that they claim prohibit or effectively prohibit their provision of service, because that remedy is only available to providers of telecommunications services. ISPs may also be denied access to utility poles that provides an expeditious means of deploying fiber. In light of the Commission’s concern that state and local

¹ See *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (“*Open Internet Order*”).

² See 47 C.F.R. Part 8: Protecting and Promoting the Open Internet.

³ See *In the Matter of Restoring Internet Freedom*, Notice of Proposed Rulemaking, 2017 WL 2292181, at *13-14, ¶¶ 44-46 (2017) (“*NPRM*”).

regulations could impede broadband deployment, and the need for access to utility poles, the Commission's attempt to "deregulate" the internet could hinder broadband deployment.

II. NET NEUTRALITY BENEFITS CONSUMERS, THE ECONOMY, AND THE INDUSTRY

The net neutrality rules established by this Commission in 2015 recognize the importance of maintaining a level playing field for all internet content to be enjoyed by all users, regardless of their internet provider. Since the Commission established those rules, consumers have benefited immensely from an open internet, which is driving innovation and economic growth across every segment of society.

For many years, San Francisco and cities throughout the United States called for nationwide internet protections that enforce the following nondiscrimination principles: (i) commitment to transparency; (ii) the free flow of information over the internet; (iii) no blocking of lawful websites; (iv) no unreasonable discrimination of lawful network traffic; and (v) no paid prioritization.

In 2015, the FCC enshrined the principles of free and open internet service into law, through the reclassification of internet service as a "telecommunications service" under Title II of the Communications Act. The Commission's apparent intent in this proceeding to reverse that determination poses a significant risk of stifling innovation and harming local economies across the country. It also threatens American households. Full reversal would have a particularly negative impact on low and middle income families, by potentially restricting access to certain types of online content and services only to those can afford to pay more. If internet providers can restrict access to certain types of content and services, or charge customers for the luxury of offering or accessing certain information or services online, small business owners and low and middle income families may be deprived of access to the modern economy. For these and many other reasons, reversing these crucial protections will prove disruptive for families, small businesses, and countless others including nonprofits, schools, and libraries.

The negative impacts would also be significant for technology startups, which are a crucial part of the economy in San Francisco and the entire Bay Area, as well as many other cities. San Francisco depends on its thriving startup community to drive innovation and continued economic growth. These emerging companies need net neutrality to gain fair and competitive access to customers. Reversing the Commission's net neutrality rules could see these startups' innovative products and solutions relegated to the background as internet providers offer their established solutions to entrenched businesses and consumers that can afford to pay for privileged status.

The public policy the Commission envisioned in 2015 has been good for the economy and consumers. During that time-period, the internet has thrived. Today, more than 80% of adults in the United States have high-speed internet access at home.⁴ Google's (Alphabet's) market capitalization is now second only to Apple's.⁵ Facebook has more than doubled in size and now has nearly 200 million users in the United States.⁶ Snapchat's share price rose nearly 50% on its first day of trading earlier this year. Netflix and Amazon are both producing award-winning content that is widely available at a reasonable cost.⁷ Over 33 million people follow the President of the United States on Twitter.⁸

The FCC should maintain and enforce the 2015 net neutrality regulations in order to ensure that the principles of openness, freedom, and innovation continue to drive the American economy throughout the twenty-first century.

⁴ See Pew Research Center, *Internet/Broadband Fact Sheet* (<http://www.pewinternet.org/fact-sheet/internet-broadband/>).

⁵ See Trending To Most, *Top Ten Companies by Market Capitalization* (<http://www.trendingtopmost.com/worlds-popular-list-top-10/2017-2018-2019-2020-2021/business/companies-market-capitalization-world-largest/>).

⁶ See <https://www.statista.com/statistics/408971/number-of-us-facebook-users/>.

⁷ See Adam Levy, *Amazon's Content Budget Is Catching Up With Netflix's (If It Hasn't Already)* (<https://www.fool.com/investing/2017/04/18/amazons-content-budget-is-catching-up-with-netflix.aspx>).

⁸ See <https://twittercounter.com/pages/100>.

III. IN THE *OPEN INTERNET ORDER*, THE COMMISSION CORRECTLY PREDICTED THAT CLASSIFYING INTERNET SERVICE AS A TELECOMMUNICATIONS SERVICES WOULD NOT HAVE A NEGATIVE IMPACT ON INVESTMENT AND INNOVATION

In the *Open Internet Order*, the Commission addressed the industry's claim that classifying internet service as a telecommunications service would stifle investment and innovation. In rejecting that claim, the Commission determined that factors other than the regulatory classification of the internet would continue to lead the internet's development:

The key drivers of investment are demand and competition. Internet traffic is expected to grow substantially in the coming years, and the profits associated with satisfying that growth provide a strong incentive for broadband providers to continue to invest in their networks. In addition, continuing advances in technology are lowering the cost of providing Internet access service. The possibility of enhancing profit margins can be expected to induce broadband providers to make the appropriate network investments needed to capture a reduction in costs made possible only through technological advances.⁹

In order to justify its seeming intent to reverse that determination, in this *NPRM* the Commission states that it “believe[s] that the Commission’s predictions and expectations regarding broadband investment and the nature and effects of reclassification on the operation of the marketplace were mistaken and have not borne out by subsequent events.”¹⁰ The Commission finds that the *Open Internet Order*’s “increased regulatory burdens and regulatory uncertainty” led to “depressed broadband investment and reduced innovation” as providers “devoted more resources to complying with new regulations.”¹¹

To support that statement, the Commission relies on one study, while completely ignoring better evidence to the contrary. Moreover, that study, conducted by Hal Singer a senior fellow at George Washington Institute of Public Policy, does not necessarily support the Commission’s conclusion. Mr. Singer states that “capital expenditure from the nation’s twelve largest ISPs has fallen by \$3.6 billion, a 5.6% decline relative to 2014 levels.”¹² Mr. Singer

⁹ *Open Internet Order*, *supra*, 30 FCC Rcd at 5792, ¶ 412.

¹⁰ *NPRM*, *supra*, 2017 WL2292181, at *16, ¶ 53.

¹¹ *Id.* at *13, ¶ 44.

¹² *Id.* at *13, ¶ 45, citing Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016) (<https://halsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era>).

conceded, however, that the Commission's net neutrality regulations might not have directly caused the decreased spending levels, even though he believes that the timing implies a correlation. He acknowledged that another possible factor is the lower cost of newer broadband networks.¹³

The Commission acknowledges there is contrary evidence. It briefly cites and dismisses another report issued by the Free Press, stating that "other interested parties have come to different conclusions."¹⁴ The *Free Press Report* shows that investment in broadband infrastructure has actually increased since 2015 due to the *certainty* of the Commission's net neutrality regulations:

Financial and marketplace evidence demonstrates that the FCC's 2015 Open Internet Order is an absolute success, accomplishing its stated goal of preserving and promoting the online ecosystem's "virtuous cycle of investment." ISP investments accelerated following the vote (e.g., aggregate capital expenditures by publicly traded ISPs have risen by more than 5 percent during the two-year period since the FCC's February 2015 vote; investments in core network technology at cable companies during that same time period are up by more than 48 percent). Investments in the edge, including those by online video providers and edge computing firms, are up as well (e.g., capital expenditures by firms in the U.S. data-processing sector increased 26 percent in the year following the FCC's order while there was just 4 percent growth in the year prior). More new U.S. "over-the-top" video services launched in the two years following the vote than in the seven years prior. Furthermore, the certainty the FCC's action created spurred the entry of numerous pay-TV full replacement providers, with vertical carriers such as AT&T now distributing (and others poised to distribute) their pay-TV services via other ISPs' last mile networks.

In sum, the 2015 Open Internet Order and accompanying legal classification decision settled the prior uncertainty about open,

¹³ See Mike Snider, *Did Net neutrality keep broadband out of low-income neighborhoods, as FCC claims?* (May 5, 2017) (<https://www.usatoday.com/story/tech/news/2017/05/05/did-net-neutrality-keep-broadband-out-low-income-neighborhoods/100979808/>).

¹⁴ *NPRM*, *supra*, 2017 WL 2292181, at *13, ¶ 45, citing Free Press, *Internet Service Providers' Capital Expenditures* (Feb. 28, 2017) ("*Free Press Report*") (<https://www.savetheinternet.com/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-ii-era.pdf>). The Commission suggests that this study did not "incorporate the generally accepted accounting practice of maintaining consistency over time." *NPRM*, *supra*, 2017 WL 2292181, at fn. 116.

nondiscriminatory broadband telecom service access. What followed that decision was a historic period of U.S. investment and innovation.¹⁵

The Free Press Report bases that conclusion on financial statements and comments that publicly traded ISPs presented to their investors and to the Securities and Exchange Commission that show the following:

- Capital expenditures at publicly traded ISPs were 5.3 % higher during 2015-2016 (the period following the *Open Internet Order*) than during 2013-2014.¹⁶
- Sixteen of the 24 publicly traded ISPs witnessed an increase in capital investments since 2015, and none of the ISPs that witnessed a decrease attributed their decline to a change in FCC policy.¹⁷
- Decreases in capital expenditures were “uniformly due to earlier completion of cycle upgrades and/or completion of more capital-intensive portion of upgrades.”¹⁸

In fact, in December 2016 Comcast’s chief financial officer told investors that concerns regarding the *Open Internet Order* were based on “the fear of what Title II could have meant, more than what it actually did mean.”¹⁹ In December 2015, AT&T’s chief executive officer stated that due to the completion of one project its capital expenditures had decreased dramatically, but that the company is going to “deploy more fiber next year than we did this year.”²⁰ When asked whether the net neutrality rules were an impediment to moving forward with these plans, he stated “no, we don’t think so” and “everything that we are planning on doing fits within those rules.”²¹

¹⁵ *Free Press Report* at 2.

¹⁶ *Free Press Report* at 4 and figure 1.

¹⁷ *Free Press Report* at 4 and figure 1.

¹⁸ *Free Press Report* at 4 (underscoring deleted).

¹⁹ *Free Press Report* at 68 (underscoring deleted), *quoting* Comments of Mike Cavanagh, Senior EVP & CFO, Comcast Corp., at the UBS Global Media and Communications Conference (Dec. 7, 2016).

²⁰ *Free Press Report* at 87, fn. 235 (underscoring deleted), *quoting* Comments of Randall Stephenson, Chairman & CEO, AT&T Inc., at UBS Global Media and Communications Conference (Dec. 8, 2015) (“Stephenson Comments”). Mr. Stephenson also stated that certain “productivity gains” had allowed AT&T to “continue expanding capacities” at lower cost. (*Free Press Report* at 30, *citing* Stephenson Comments.)

²¹ *Free Press Report* at 31, fn. 39, *quoting* Stephenson Comments 2015.

Finally, the *Free Press Report* cites the U.S. Census Bureau's Annual Capital Expenditures Survey. The Census Bureau found that total U.S. telecommunications industry capital investments during 2015 were \$87.184 billion, which is more than \$553 million higher than investments in 2014.²² At the same time, capital investment by all U.S. telecommunications carriers offering wired broadband internet access service was up nearly \$2.7 billion during 2015, nearly a 6 percent increase over 2014.²³

The Commission's concerns about reduced capital spending by small ISPs are also overstated.²⁴ In San Francisco, at least three such entities are providing service. One company, Sonic, started providing service in Santa Rosa California before moving into San Francisco. Sonic supported the *Open Internet Order*. Dane Jasper, Sonic's chief executive officer, recently told the San Jose Mercury News that the decision "didn't hamper our investment or our concerns about our future ability to monetize the networks that we build." As Mr. Jasper told this Commission in another proceeding, in 2016 Sonic launched its "Gigabit Fiber Fusion product" in three San Francisco neighborhoods and is continuing its expansion into other neighborhoods and Bay Area cities.²⁵

Other small ISPs are similarly growing. Monkeybrains is a San Francisco based ISP founded in 1998 as a dial-up ISP operating out of a warehouse in San Francisco. Today, Monkeybrains operates a hybrid network of fiber optic and high capacity wireless links servicing over 5000 locations in San Francisco with 25 new locations coming online every week.²⁶

In 2003, Webpass was providing service in one building in San Francisco. It has since expanded to San Diego, Miami, Chicago, Boston, and Denver. In 2016, Webpass was acquired

²² See Free Press Study at 22 and Figure 2.

²³ See Free Press Study at 22 and Figure 2.

²⁴ See *NPRM, supra*, 2017 WL 2292181, at *146, ¶ 47.

²⁵ Declaration of Dane Jasper dated May 17, 2017 at ¶¶ 10-14, submitted in MB-17-91, *In the Matter of Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council* (<https://ecfsapi.fcc.gov/file/1051825116224/FCC%20Petition%20for%20Preemption%20of%20Article%2052%20-%20Declaration%20Dane%20Jasper.pdf>).

²⁶ See <https://www.monkeybrains.net/>.

by Google Fiber. Today, Webpass serves tens of thousands of residential and business customers.²⁷

The Commission was correct in 2015 when it predicted that classifying internet service as a telecommunications service would not negatively affect investment or innovation. Nothing in the *NPRM* supports the Commission's present assertions to the contrary.

IV. THE COMMISSION CANNOT JUSTIFY ITS REVERSAL OF THE *OPEN INTERNET ORDER*

The FCC, like other federal agencies, does not have unfettered discretion to change its policy positions. The United States Supreme Court requires that, when an agency changes its existing position, it must at least "display awareness that it *is* changing position" and "show that there are good reasons for the new policy."²⁸ Where a "new [agency] policy rests upon factual findings that contradict those which underlay its prior policy" the agency must provide a "detailed justification" for the new policy."²⁹ "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."³⁰ As the Court has noted:

A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.³¹

Here, the Commission attempts to justify reversing the prior determination that internet service is a telecommunications service by finding that the Commission's determination in the

²⁷ See https://webpass.net/about_us.

²⁸ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original).

²⁹ *Id.*

³⁰ *Id.* at 516.

³¹ *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41-42 (1983) (internal quotation marks and citations omitted).

Open Internet Order has led to decreased investment in broadband infrastructure since 2015.³² That finding, however, is not fully supported by the study the Commission relies upon, and is expressly rejected in a study that the Commission cites but does not discuss. The best evidence in this record is that the prior Commission’s “predictive judgments” that classifying internet service as would not undermine investment and innovation were correct.³³ For this reason, the Commission has not satisfied the requisites for reversing that policy.

V. SHOULD THE COMMISSION FIND THAT INTERNET SERVICE IS AN INFORMATION SERVICE, INTERNET SERVICE PROVIDERS WILL NO LONGER BE ABLE TO RELY ON 47 U.S.C. SECTION 253 TO OBTAIN ACCESS TO THE PUBLIC RIGHT-OF-WAY; THEY COULD ALSO BE DENIED ACCESS TO UTILITY POLES

In the Commission’s wireline proceeding, the Commission seeks comments on its suggestion that “restrictions on broadband deployment may effectively prohibit the provision of telecommunications service.”³⁴ The Commission asks the following question: “What telecommunications services are effectively prohibited by restrictions on broadband deployment?”³⁵ The reason for this suggestion and question is that the Commission is seeking to use 47 U.S.C. section 253(a) to preempt local requirements that “prohibit or have the effect of prohibiting” the deployment of broadband infrastructure.

By its express terms, section 253(a) only applies to providers of “interstate or intrastate telecommunications service.” As a result of the Commission’s determination in the *Open Internet Order* that internet service is “telecommunications service,” ISPs can challenge local

³² See *NPRM, supra*, 2017 WL 2292181, at *16, ¶ 53; *Open Internet Order, supra*, 30 FCC Rcd at 5791, ¶ 410.

³³ In upholding the *Open Internet Order*, the Court of Appeal found that “the Commission’s predictive judgments about the effect mandatory unbundling would have on broadband deployment were perfectly reasonable and supported by record evidence.” *United States Telecom Ass’n v. F.C.C.*, 825 F.3d 674, 732 (D.C. Cir. 2016). Here, the Commission makes the “predictive judgment that reversing the Title II classification and restoring broadband Internet access service to a Title I service will increase investment.” *NPRM, supra*, 2017 WL 2292181, at *14, ¶ 46.

³⁴ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 2017 WL 1426086, at *32, ¶ 101 (2017).

³⁵ *Id.*

regulations under section 253(a). That might not be the only detriment to ISPs of reclassifying internet service as an information service. Under 47 U.S.C. § 224, ISPs have access to utility poles that can be used to expeditiously deploy fiber-optic lines.³⁶ Should the Commission reverse that determination, and conclude the internet service is an “information service,” then ISPs will be precluded from asserting any such rights. Such a ruling could limit the ability of ISPs to obtain access to the public right-of-way and utility poles.

VI. CONCLUSION

The Commission’s existing net neutrality rules benefit consumers and providers alike. The Commission has not shown the need to change those rules by adopting a “light-touch” regulatory scheme. There is no evidence that the Commission’s existing rules have limited investment or innovation. To the contrary, the internet has thrived since the Commission started regulating internet service as a telecommunications service. There is no need for the Commission to reclassify internet service as an information service or rescind its existing regulations in order to promote further broadband deployment.

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³⁶ In the *Open Internet Order*, the Commission “decline[d] to forbear from applying section 224 and the Commission’s associated [pole attachment] rules with respect to broadband Internet access service.” *Open Internet Order, supra*, 30 FCC Rcd at p. 5831, ¶ 478.